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No. 84-929

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

DELTA AIR LINES, INC.,
Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of the State of Florida

APPELLANT'S OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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THERE ARE SUBSTANTIAL NEW ISSUES PRESENTED BY THIS APPEAL

The issues raised in this appeal are substantial and have not been addressed by this Court.

The decision of the Supreme Court of Florida relies upon characterizations of the tax based upon cases decided in this Court which have been effectively overruled by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and therefore is inconsistent with more current decisions of this Court.

ARGUMENT

I. THE QUESTIONS PRESENTED ARE SUBSTANTIAL

If this case involved a nondiscriminatory general revenue tax, Delta Air Lines, Inc. ("Delta") would never have sought judicial review and would therefore agree with the Florida Department of Revenue (the "Department") that the commerce clause issues raised herein have already been addressed by this Court. But if the tax involved here is a user tax, the Department apparently agrees with Delta that a different analysis must be applied than that made by the Court in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); one which this Court has yet to face.

The Supreme Court of Florida decided that the sales tax on fuel imposed in Chapter 83-3 was not a user tax as a matter of law and as a matter of fact. Applying outdated commerce clause cases, it characterized the tax simply as an "excise tax" on the privilege of engaging in certain businesses. If states are permitted to characterize earmarked taxes as general revenue taxes in this fashion, they will also be permitted, in effect, to repudiate the clear and logical analysis of a tax required in *Complete Auto Transit* and once again to elevate form over substance *ala Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951).

Similarly, the commerce clause and equal protection issues embodied in a so-called percentage sales tax, set at an artificial level, which taxes jet fuel at a higher rate than gasoline and which does not apply to other non-road users including non-road user common carriers, have not been heretofore addressed by this Court. This case is important because other states have already indicated a desire to follow the pattern established by Florida of a tax on airlines' fuel purchases to raise money for special projects not related to airlines. The Court should

establish clear constitutional parameters for the imposition of user taxes and recognize the need for like treatment of similar interstate common carriers.

II. THE TAX IS A USER FEE

The tax imposed on fuel in Chapter 83-3 and earmarked primarily for road building and maintenance must be recognized for what it is—a road-user tax. The Department argues that the tax is an excise tax and not a user fee. But what is a user fee if it is not an excise tax imposed for the privilege of using a facility? *The term "excise tax" is generic.* All of the Florida cases cited by the Department construing Chapter 212 as an excise tax applied to the Chapter before it was amended by Chapter 83-3, and therefore have no precedential value for the tax at issue. The Supreme Court cases which the Department cited are also inapposite. More importantly, none of these cases relates to the issue of whether the tax is a general revenue or user tax.

Edelman v. Boeing Air Transport, Inc., 289 U.S. 249 (1933) cited as an example of a constitutional excise tax involved a "use" tax. Fuel was purchased outside of Wyoming, then brought into the State, stored, and subsequently used in interstate commerce. The use tax was imposed upon the withdrawal from storage. The Court held that the exercise of the powers taxed, the storage and withdrawal from storage, was too indirect and remote from the function of interstate commerce to transgress constitutional limitations. There was no indication that the tax was used for anything other than general purposes or was imposed only on a selective group of taxpayers.

In *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U.S. 147 (1932), the tax challenged was a sales tax described as a license tax imposed for the privilege of carrying on the business of selling gasoline within the State. The tax was construed to be an

excise tax as opposed to a property tax. The Court applied the then current direct/indirect burdens test for constitutionality under the commerce clause and held that the tax was imposed on goods sold and its validity could not be questioned because the tax would be upon a part of property within the State and hence subject to the State's authority to tax. The *Eastern* case also did not address the general revenue/user tax issue, but did address the need for similar treatment of airlines and railroads in holding there was no distinction between the sale of coal for locomotives and gasoline used in airplanes for tax purposes.

Similarly *United Air Lines v. Mahin* 410 U.S. 623 (1973) does not address the general revenue/user tax question. That case deals with a use tax imposed on fuel purchased outside Illinois, brought into the State and stored there. The State had imposed the use tax on fuel on withdrawal from storage using a pro-ration (a "burn-off" rule) and applying a temporary storage exemption to the fuel stored in the State but used in interstate commerce. A new interpretation of the Department of Revenue had denied the applicability of the temporary storage exemption. The Court held that it was not an unconstitutional burden on interstate commerce to tax the entire withdrawal from storage, but the Court also held that the burn-off rule was not unconstitutional, distinguishing *Helson v. Kentucky*, 279 U.S. 245 (1929) relied upon by the Supreme Court of Illinois and remanded the case for further consideration in light of this. This case too, did not address the issue Delta now raises.

While the Florida Supreme Court characterized the tax imposed under Chapter 83-3 as an excise tax imposed on the privilege of engaging in certain businesses, the tax was imposed on the incident of first withdrawal. Typically a sales tax is imposed on the privilege of making retail sales and a corresponding use tax is im-

posed on the use of property purchased elsewhere but used in the state. Florida is trying to have it both ways with this tax. The State has adopted sales tax analogies where it is desirable and use tax analogies where those are advantageous. The tax on the incidence of withdrawal from storage, or storage itself, is a use tax characteristic that is applied when property is purchased outside the state but stored inside the taxing state; yet the tax is being applied to purchases within the state, not to the storage or withdrawal from storage itself.

The fact that the tax under Chapter 83-3 is an excise tax as argued by the Department is not determinative of whether the tax is a general revenue tax or a user tax. Both are excise taxes. It is also not relevant whether this is a sales tax or a use tax or whether the sale or withdrawal from storage in the State is taxed. It is the *purposes* for which the funds are raised and *from whom* the tax is collected that determine whether a tax is a user (excise) tax or a general revenue (excise) tax. When a tax is collected solely from road users (except for airlines) and used for road purposes, then it should be characterized as a road-user tax. The fact that the State collects the tax from the wholesaler instead of at the pump also is irrelevant. The tax was imposed to fund Florida's highways and is ultimately borne by the fuel consumer to pay for his use of the roads. The airlines are anomalous non-user taxpayers, indeed, the only non-user taxpayers. Other non-user common carriers and other non-road-user purchasers have been properly excluded.

The tax challenged in *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972) was imposed on airline passengers to pay for airport facilities. The Court held:

> We therefore regard it as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs

> of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike.

Id. at 714. The Court likened the fee to a highway toll imposed upon highway users. Even in those cases which the Court cited involving highway fees, the toll could not be excessive and some highway user taxes were invalidated because the standards were wholly unrelated to road use.

The tax here imposed under Chapter 83-3 was compared to a highway toll charge by Dr. Small, Delta's expert witness, who testified that Florida's fuel tax operates identically to a toll bridge or toll road. Other than the airlines, the taxpayers are exclusively road users (agricultural, fishing, home heating and other non-road uses are exempt from the tax). The amount of the tax paid by each user bears a direct relationship to his use of the roads. This tax is therefore almost identical to the tax reviewed in *Evansville-Vanderburgh.*

Obviously, if the distinctions relied upon by the Department and accepted by the Supreme Court of Florida are permitted to prevail, then every state will play the semantics game played by Florida to avoid a commerce clause constitutional challenge. It is the threshhold question of law as to the characterization of the tax which we seek to have the Court examine. A finding by the Court that this road tax is a user tax should result in a finding also that the tax as applied to the airlines violates the "fairly related" fourth prong of the *Complete Auto Transit* test.

III. THE TAX SINGLES OUT AIRLINES

The Department addresses many of Delta's equal protection arguments in its commerce clause arguments but misses the thrust of Delta's arguments. The Department also fails to understand the third prong commerce clause

argument which Delta raises. These arguments both demonstrate discrimination against the airlines. In the former, Delta argues that airlines are treated unfairly as opposed to other non-road-user common carriers. In the latter, Delta argues that interstate airlines pay a higher rate of tax than other, primarily intrastate, taxpayers pay which violates the third prong of the *Complete Auto Transit* test.

A. Airlines Versus Railroads and Vessels

The Department relies upon *Nashville C. & St. L. R. Co. v. Wallace*, 288 U.S. 249 (1933) in its commerce clause arguments for the principle that the tax is an "excise tax" and presumably therefore a general revenue tax and for the proposition that the airlines are not discriminated against by having to pay a road tax when they do not use roads. The Department also relies upon this case for its response to equal protection arguments.

The discrimination argument made in *Wallace* by the railroads that they were taxed for roads they did not use was a commerce clause argument very similar to the third and fourth prong arguments which Delta now raises. The Court in 1933 applied the direct/indirect burdens commerce clause analysis and found no discrimination under the commerce clause. The "fairly related" test had not been developed and the analysis was that the fuel was taxed before it entered interstate commerce and therefore was not a burden on interstate commerce.

The equal protection question raised by Delta challenges the classification of airlines differently from other non-road user common carriers, railroads and vessels. The only basis which has been asserted for that classification is the ad valorem tax exemption of leasehold interests from which airlines (as well as other lessees of governmental property) benefit. Even under the broad discretion for classification afforded to the states, that ex-

emption would not justify the imposition of $53 million of fuel tax annually on airlines while totally exempting railroads and vessels from the tax.

B. Airlines Versus Other Taxpayers

The Department argues that the tax is imposed on a fixed price per gallon, facilitating collection, because it is collected on its first withdrawal from storage and that the tax is similar to a "cents per gallon" excise tax. Delta agrees that the tax could have been framed as a "cents per gallon" excise tax similar to the old road user fuel tax had it been left in the old fuel tax chapter instead of being moved to the sales tax chapter. The whole purpose however in moving the tax to Chapter 212 was to avoid the road user designation. Chapter 212 does not impose a "cents per item" tax. It purports to impose a 5% tax on sales and use. By using the percentage sales tax and contriving an artificial fixed price of fuel predicated on the price of gasoline and indexed based on the gasoline price index, the Legislature, in reality, imposed a higher percentage tax on airline fuel, which has historically been priced lower than gasoline. That is not to say that a "cents per gallon" tax for general revenue purposes could not be constitutionally imposed on jet fuel. It is to say, however, that the fuel tax under Chapter 212 does not meet constitutional muster under the third prong of the *Complete Auto Transit* test since the primarily intrastate motorist pays only a 5% tax while the only interstate common carrier taxed pays a tax in excess of 6%.

CONCLUSION

For each of the reasons set forth above and in Delta's Jurisdictional Statement, this Court should note probable jurisdiction to review the opinion and judgment of the court below.

Respectfully submitted,

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